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1912, c. 160), authorizing a municipal administrative board to determine damages because of change of street grades, a resolution directing the grading to be done must precede the ascertainment of damages by the board, and an ascertainment of damages before such authorization by resolution is ineffectual.

Error to Law and Equity Court of City of Richmond.

Trespass on the case by one Childrey against the City of Richmond. Judgment for plaintiff, and defendant brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error.

A. H. Sands, of Richmond, for defendant in error.

KELLO *v.* KELLO'S EX'RS et al.

June 10, 1920.

[103 S. E. 633.]

1. Wills (§ 441*)—Circumstances at Testator's Death Considered.—To comprehend the scheme which the testator had in mind, will is to be construed with reference to the circumstances and conditions surrounding its execution.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 789, et seq.]

2. Wills (§ 450*)—Effect Should Be Given All Parts.—A will should be so interpreted as to give effect to every part and word thereof, provided some effect can be given to each part not inconsistent with some intent manifested by the entire instrument.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 782.]

3. Wills (§ 456, 463, 470*)—Words Need Not Be Given Ordinary Meaning; When Necessary to Give Effect to Intention.—The intention of the testator must be sought from the whole instrument, but words may be rejected or construed in a sense different from their ordinary meaning when necessary to give effect to the intention ascertained.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 785, 786.]

4. Wills (§ 506 (2)*)—Bequest to "Nearest Heirs" Is to Those Taking under Statute of Descent.—Where testator, after making numerous bequests, bequeathed the residue of his estate to be divided equally among his nearest heirs and it appeared that he left a brother, nieces and nephews, the children of deceased brother and sisters, as well as a great-niece and great-nephews, etc., held, that "nearest heirs" will not be construed as meaning nearest in blood or as nearest of kin and giving the entire residue to the brother, but will be deemed

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

as meaning those persons entitled to take under the statute of descents regarded in law as nearest heirs, and hence the state should be divided among the brother, nieces, etc.

[Ed. Note.—For other definitions, see Words and Phrases, Nearest Heirs.]

Appeal from Circuit Court, Southampton County.

Bill by E. D. Kello against the executors of John G. Kello, deceased, and others. From a decree directing the executors to divide the residuary estate into parts and to give only one to complainant, he appeals. Affirmed.

Jno. N. Sebrell, Jr., of Norfolk, for appellant.

Jas. H. Corbitt, of Suffolk, and *Jas. T. Gillette*, of Courtland, for appellees.

LATHAM *v.* POWELL.

June 10, 1920.

[103 S. E. 638.]

1. Sales (§ 179 (5)*)—Caveat Emptor Does Not Require Buyer of Cattle at Specified Weight Per Pound to Examine Aggregate Weight.—Purchaser of cattle at specified price per pound on board cars at shipping points did not, by acceptance of cattle delivered, assent to the weight thereof as claimed by seller, under the maxim of caveat emptor, in absence of a showing of conduct on the part of purchaser whereby he waived his right to question the accuracy of the aggregate weight charged against him; the maxim not applying in such case.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 26.]

2. Sales (§ 167*)—Maxim of Caveat Emptor Applicable to Executory Contracts by Description.—The maxim caveat emptor applies, so far as quality is concerned, as well to executory contracts of sale of chattels by description as to present sales of specific chattels, where in the absence of fraud there has been an acceptance of the subject to the sale.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 10, et seq.]

3. Sales (§ 269*)—Maxim of Caveat Emptor Inapplicable, Where There Is Express or Implied Warranty.—The maxim of caveat emptor does not apply where there is an express warranty, or where there is a warranty implied from the nature and circumstances of the case.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 659.]

4. Sales (§ 273 (3)*)—Seller Held to Have Impliedly Warranted Quality of Cattle.—Where buyer of cattle informed seller that he was buying the cattle to supply his trade, and that it was necessary that the

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